Supreme Court, U.S.
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No. ____

In the
Supreme Court of the United States

ANNELORE B. NORTON, ET AL.,
Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT J. MUISE
Counsel of Record

KIMBERLY A. DANIELS
THOMAS MORE LAW CENTER
3475 PLYMOUTH ROAD
SUITE 100
ANN ARBOR, MI 48105-2550
(734) 827-2001

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

This case challenges Congress' authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act ("FACE"). FACE regulates local, noneconomic criminal activity; it lacks any jurisdictional element tying its particular applications to interstate commerce; and it involves the federal government in an area that is traditionally of local concern. As such, FACE exceeds Congress' Commerce Clause authority under *United States v. Lopez* and *United States v. Morrison*, and the panel's decision to the contrary should be reversed.

Additionally, by requiring the Petitioners to surrender their protected speech rights and "simply move their counseling activities across the street," the panel's decision threatens the rule of law that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." It also tacitly approves the intimidating police tactics that caused the Petitioners to forgo their First Amendment rights. Thus, the public as a whole has a significant interest in the constitutional issues presented by this case.

1. Does the Commerce Clause grant Congress the authority to regulate the noneconomic, intrastate criminal activity proscribed by 18 U.S.C. § 248, the Freedom of Access to Clinic Entrances Act ("FACE"), particularly since FACE lacks a jurisdictional element?

2. Did the Sixth Circuit err in holding that the local criminal conduct regulated by FACE "is properly considered commercial activity" for Commerce Clause purposes because of its aggregate secondary economic effects, a holding in

conflict with *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)?

3. Is the Petitioners' as-applied First Amendment challenge to FACE valid and ripe for review, based as it is on credible threats made by federal law enforcement agents to the Petitioners claiming that by peacefully holding out literature on the sidewalk outside an abortion clinic they were causing cars to stop in the driveway and thereby blocking access to the clinic in violation of FACE?

PARTIES TO THE PROCEEDING

The Petitioners are Annelore B. Norton and Lois Greiffendorf ("Petitioners").

The Respondents are United States Attorney General John Ashcroft; United States Attorney for the Western District of Michigan, Michael H. Dettmer; United States Marshal for the Western District of Michigan, Barbara C. Lee; and Special Agent, Federal Bureau of Investigation, Gerry Alexander ("Respondents").[1] All of the Respondents were sued in their official capacities.

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[1] Former United States Attorney General Janet Reno was sued in the original action and was substituted in the court of appeals by United States Attorney General John Ashcroft.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 3

I. *LOPEZ* AND *MORRISON* DEMONSTRATE THAT THE COMMERCE CLAUSE DOES NOT EMPOWER CONGRESS TO REGULATE THE NONECONOMIC, INTRASTATE CRIMINAL ACTIVITY PROSCRIBED BY FACE. 5

A. FACE DOES NOT REGULATE COMMERCIAL ACTIVITY. 7

B. THE PANEL IMPROPERLY CONSIDERED THE REGULATED ACTIVITY'S AGGREGATE EFFECT ON INTERSTATE COMMERCE. 9

1. Since abortion-related criminal activity is not economic in nature and since FACE is not part of a larger regulatory scheme, the aggregate economic effects of the activity regulated by FACE should not have been considered by the panel. 9

2. The panel incorrectly relied on congressional findings, which on their own are insufficient to sustain FACE's constitutionality under the Commerce Clause. 11

C. THE LACK OF A JURISDICTIONAL ELEMENT FURTHER DEMONSTRATES THAT CONGRESS EXCEEDED ITS COMMERCE CLAUSE AUTHORITY WHEN IT ENACTED FACE. 12

D. FACE RAISES SIGNIFICANT FEDERALISM CONCERNS. 14

II. THE PANEL'S DECISION ABROGATES THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS. 15

CONCLUSION 18

APPENDIX

Appendix A
Court of Appeals Order - 9/26/02 . . . . . 1a

Appendix B
Court of Appeals Opinion - 7/31/02 . . . . . 3a

Appendix C
District Court Opinion - 11/24/00 . . . . . 23a

Appendix D
District Court Order - 11/24/00 . . . . . 42a

Appendix E
18 USCS § 248 (2002) 44a

TABLE OF AUTHORITIES

Cases:

American Communications Ass'n, C.I.O. v. Douds,
339 U.S. 382 (1950) 17

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 17

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984) 16

Brzonkala v. Virginia Polytechnic Inst. & State Univ.,
169 F.3d 820 (4th Cir. 1999) 13

Elrod v. Burns,
427 U.S. 347 (1976) 16

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,
452 U.S. 264 (1981) 12

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 16

Jones v. United States,
529 U.S. 848 (2000) 15

Schenck v. Pro-Choice Network of Western New York,
519 U.S. 357 (1997) 15

Schneider v. New Jersey,
308 U.S. 147 (1939) 16, 17

Steffel v. Thompson,
415 U.S. 452 (1974) 17

United State s v. Lopez
514 U.S. 549 (1995) . . . . . *passim*

United States v. Corp,
236 F.3d 325 (6th Cir. 2001) 10

United States v. Morrison
529 U.S. 598 (2000) . . . . . *passim*

United States v. Wang,
222 F.3d 234 (6th Cir. 2000) 15

White v. Lee,
227 F.3d 1214 (9th Cir. 2000) 17

Wickard v. Filburn,
317 U.S. 111 (1942) 8-10

Statutes:

18 U.S.C. § 248 1

18 U.S.C. § 844(i) 15

18 U.S.C. § 1951 15

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 1346 2

Other Authorities:

Glenn H. Reynolds & Brannon P. Denning,
Lower Court Readings of Lopez, *or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*,
2000 Wis. L. Rev. 369 3-4

Glenn H. Reynolds & Brannon P. Denning,
Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts,
55 Ark. L. Rev. (forthcoming 2003) 4

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the three-judge panel, App. 3a, appears at 298 F.3d 547. The district judge's opinion, App. 23a, appears at 2000 WL 1769580 (W.D. Mich.).

JURISDICTION

The opinion of the panel was issued on July 31, 2002. A timely petition for rehearing en banc was denied on September 26, 2002. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides, in relevant part, that Congress shall have the power "to regulate Commerce . . . among the several states . . . ." U.S. Const. Art. I, § 8, cl. 3. The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. See Appendix for FACE, 18 U.S.C. § 248, App. 44a.

STATEMENT OF THE CASE

This case challenges Congress' authority pursuant to the Commerce Clause to regulate the noneconomic, intrastate criminal activity proscribed by FACE, and it asserts the fundamental First Amendment right of Mrs. Norton and Mrs. Greiffendorf ("Petitioners") to peacefully counsel, pray, and protest on the public sidewalks outside of a Planned

Parenthood abortion clinic in Kalamazoo, Michigan, without being subject to prosecution under FACE.

Because of credible threats by federal law enforcement agents to enforce FACE against the Petitioners for their peaceful sidewalk counseling activities, the Petitioners have curtailed their First Amendment activity outside of this clinic. Specifically, federal law enforcement agents warned the Petitioners that by standing on the public sidewalk next to the abortion clinic driveway and holding out literature, the Petitioners were causing cars to stop in the driveway and thereby blocking access to the clinic in violation of FACE, even though the Petitioners themselves were not blocking the clinic driveway nor anyone entering or departing the clinic.

The Petitioners filed a seven-count complaint in federal district court challenging the constitutionality of FACE on both a facial and as-applied basis.[1] The Petitioners sought to enjoin the enforcement of FACE because, *inter alia*, its threatened enforcement violated their First Amendment rights and because Congress exceeded its authority under the Commerce Clause by enacting FACE. The Petitioners also sought a judgment declaring FACE unconstitutional facially and as applied, or in the alternative, declaring that FACE did not apply to the Petitioners' sidewalk counseling activities.

In order to protect their rights, the Petitioners requested that the district court issue a preliminary injunction enjoining the enforcement of FACE. The Respondents opposed the Petitioners' motion for a preliminary injunction and simultaneously filed a motion to dismiss. The district

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[1] The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1346.

court denied the Petitioners' request for a preliminary injunction and granted the Respondents' motion to dismiss all counts. The district court alternatively declined to exercise its discretion under the Declaratory Judgment Act. The Petitioners filed a timely notice of appeal.

A Sixth Circuit panel affirmed the district court decision and denied the Petitioners' request for a rehearing en banc. Specifically, the panel affirmed, *inter alia*, the district court's ruling that Congress properly exercised its authority under the Commerce Clause by enacting FACE and its ruling that the Petitioners' as-applied First Amendment claim was not ripe for review. In upholding Congress' Commerce Clause authority in this case, the panel improperly focused on the secondary economic effects of the conduct proscribed by FACE and therefore erroneously concluded that "such conduct is properly considered commercial activity." App. 16a. In maintaining that the Petitioners' as-applied First Amendment claim was not ripe for review, the panel ignored the hardship imposed on the Petitioners and suggested that they "heed the government's advice and simply move their counseling activities across the street from the Clinic." App. 13a.

REASONS FOR GRANTING THE PETITION

The panel decision conflicts with *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), and consideration by this Court is therefore necessary to secure and maintain uniformity of the Court's decisions and Commerce Clause jurisprudence. Indeed, the panel opinion here is but one example of the lower courts' stubborn resistance to implementing *Lopez* and *Morrison*. *See generally* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What if the*

Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 Wis. L. Rev. 369; Glenn H. Reynolds & Brannon P. Denning, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. (forthcoming 2003). In this case that resistance resulted in a decision holding that Congress can regulate noneconomic, local criminal conduct based solely on congressional findings regarding that conduct's aggregate effect on interstate commerce.

Indeed, such a holding disregards *Lopez* and *Morrison*. As the *Morrison* Court stated, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613 (emphasis added). The panel elided this threshold inquiry by aggregating the secondary economic effects of the criminal conduct regulated by FACE, despite the fact that *Morrison* explicitly notes that such an analysis has only been sustained when "the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611, n.4. The panel also downplayed FACE's lack of a jurisdictional element, a critical part of Commerce Clause analysis under both *Lopez* and *Morrison*.

FACE is a criminal statute that by its own terms is non-commercial. It does not regulate abortion clinics, the services provided at such clinics, or the doctors, patients, or goods used at such clinics. Rather, it regulates those who use "force," "threat of force," and "physical obstruction" – activities closely akin to the criminal conduct at issue in *Morrison*. Just as "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity," *Morrison*, 529 U.S. at 613, abortion-motivated crimes of violence are likewise not economic activity. Congress thus may not rely

on its Commerce Clause power in attempting to regulate them.

Finally, the panel's decision undermines First Amendment rights by weakening the long-standing principle that a person need not first expose herself to actual arrest or prosecution to challenge government conduct that deters the exercise of constitutional rights. Indeed, the panel's conclusion that the Petitioners can avoid the chilling effect of the government's conduct by "mov[ing] their counseling activities across the street from the Clinic," App. 13a, threatens the basic First Amendment safeguard that one is not to have her liberty of expression abridged in appropriate places on the plea that it may be exercised elsewhere. The public as a whole has a significant interest in the protection of the First Amendment liberties at stake in this case.

I. *LOPEZ* AND *MORRISON* DEMONSTRATE THAT THE COMMERCE CLAUSE DOES NOT EMPOWER CONGRESS TO REGULATE THE NONECONOMIC, INTRASTATE CRIMINAL ACTIVITY PROSCRIBED BY FACE.

In the watershed *Lopez* decision reaffirming the limits on Congress' Commerce Clause authority, this Court held that Congress does not possess "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. Faced with lower court equivocation regarding the significance of this decision, in *United States v. Morrison* this Court strongly affirmed *Lopez*, noting further that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."

Morrison, 529 U.S. at 618 (citing, *inter alia, Lopez*, 514 U.S. at 566). Unfortunately, the panel decision persists in the equivocal reading of *Lopez* that *Morrison* put to rest and fails to come to terms with the limits *Lopez* and *Morrison* place on Congress' power to regulate activities that "substantially affect interstate commerce."

Drawing on the *Lopez* decision, in *Morrison* this Court considered four factors to determine whether a statute regulates activity that "substantially affects" interstate commerce, and thus falls within the limits of Congress' commerce clause power: (1) whether the law is "a criminal statute that by its terms has nothing to do with 'commerce'" – in other words, whether the regulated activity is itself economic; (2) whether the statute contains "an express jurisdictional element which might limit its reach"; (3) whether there are express legislative findings "regarding the effects upon interstate commerce"; and (4) whether the link between the regulated activity and interstate commerce is so "attenuated" that it fails to place any real limit on Congress' power to regulate."[2] *See Morrison*, 529 U.S. at 610-13; *Lopez*, 514 U.S. at 559-68.

Finally, in determining whether a regulated activity has a "substantial affect" on interstate commerce, both *Lopez* and *Morrison* make clear that its aggregate effects cannot be taken into account except under certain limited circumstances.

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[2] The Commerce Clause permits Congress to regulate three areas of activity: (1) the channels of interstate commerce; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. FACE is typically analyzed under the third category, and the panel employed that analysis here as well.

See Lopez, 514 U.S. at 559-60; *Morrison*, 529 U.S. at 611 n.4. Such circumstances do not exist here. Indeed, FACE regulates the noneconomic, local criminal activities of protestors and not the economic activities of abortion clinics themselves; it lacks a jurisdictional element; and it interferes with the rights of state and local governments to exercise the police powers entrusted to them by the Constitution. It thus cannot withstand scrutiny under this Court's Commerce Clause jurisprudence.

A. FACE DOES NOT REGULATE COMMERCIAL ACTIVITY.

In deciding whether a regulated activity substantially affects interstate commerce, the *Lopez/Morrison* framework first requires a court to determine whether that activity is itself economic in nature. *Morrison*, 529 U.S. at 611 ("*Lopez* . . . demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor") (citing *Lopez*, 514 U.S. at 559-560). Indeed, this consideration is central to the substantial effects analysis and is in fact the threshold inquiry. *Morrison*, 529 U.S. at 610-611 (stating that "the noneconomic, criminal nature of the conduct at issue was central to our decision in [*Lopez*]") (citing *Lopez*, 514 U.S. at 551, 560, 561, 567 (striking down the Gun Free School Zones Act ("GFSZA") because it does not "regulate a commercial activity")).

FACE does not regulate commercial activity. Instead, much like the statute at issue in *Morrison*, it regulates criminal conduct. *See* App. 44a. The panel gets around this elephant in the room by claiming that FACE "regulates activity . . . that has a direct economic effect." App. 16a.

Morrison establishes that this analysis is incorrect: it is the economic nature of the regulated activity itself, not whether the activity affects economic enterprises, that matters for Commerce Clause purposes. *Morrison*, 529 U.S. at 611 (noting that federal regulation of intrastate activity only upheld where the activity regulated is itself "some sort of economic endeavor").

By improperly focusing on the secondary effects of the conduct proscribed by FACE, the panel erroneously concludes that "such conduct is properly considered commercial activity." App. 16a. Neither *Lopez* nor *Morrison* provides any basis for this shift in focus away from the protest activity actually regulated by FACE to its secondary economic effects. To the contrary, both cases look explicitly to the commercial nature of the regulated activity itself. *Morrison*, 529 U.S. at 613 (stating that "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature") (citations omitted); *Lopez*, 514 U.S. at 560 ("Even *Wickard*, which is perhaps the most far-reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.").

Indeed, the fact that criminal conduct may also have financial effects does not transform it into commercial activity. Possession of guns in school zones and gender-motivated crimes of violence both have secondary economic effects, *see, e.g.*, *Morrison*, 529 U.S. at 635 (Souter, J., dissenting) (noting that gender-motivated crimes of violence have cost this nation billions of dollars), but such derivative consequences do not transform criminal laws proscribing such conduct into commercial regulations. *See Lopez*, 514 U.S. at 561 (striking down the GFSZA because it

was "a criminal statute that by its terms had nothing to do with 'commerce'"); *Morrison*, 529 U.S. at 613 (noting that regulation of intrastate activity has been upheld "only where that activity is economic in nature") (citing *Lopez*, 514 U.S. at 559-60, and cases cited therein). By its own terms, FACE is just such a criminal statute; it thus fails to satisfy the threshold step of the substantial effects analysis.

B. THE PANEL IMPROPERLY CONSIDERED THE REGULATED ACTIVITY'S AGGREGATE EFFECT ON INTERSTATE COMMERCE.

1. Since abortion-related criminal activity is not economic in nature and since FACE is not part of a larger regulatory scheme, the aggregate economic effects of the activity regulated by FACE should not have been considered by the panel.

In order to find Congressional authority under the Commerce Clause, the panel improperly aggregated the effects of abortion-related crime on interstate commerce and then determined that those effects were substantial. App. 16a, 18a-20a. Based on congressional findings, the panel concluded that the "effect" of the activity regulated by FACE was "directly economic" and within Congress' power to regulate a "commercial activity." App. 16a. However, as both *Lopez* and *Morrison* make clear, this aggregation analysis only applies when the activity being regulated – in this case, abortion-related criminal conduct – is itself economic in nature. *See Morrison*, 529 U.S. at 611 n.4 (recognizing that this Court has sustained federal regulation under *Wickard*'s aggregation principle only when "the regulated activity was of an apparent commercial character") (citation omitted); *Lopez*, 514 U.S. at 559-60 (recognizing

that courts must determine whether a law regulates "intrastate economic activity" before applying the aggregation analysis).[3]

In *Morrison*, the Court did not employ an aggregation analysis precisely because "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613; *see also United States v. Corp*, 236 F.3d 325, 332-33 (6th Cir. 2001) (refusing to examine the aggregate effect on interstate commerce of purely intrastate, noneconomic activity, and instead engaging in a case-by-case determination of whether the activity involved substantially affected interstate commerce). Because FACE similarly regulates noneconomic intrastate activity, the aggregation analysis is inapplicable here.

Moreover, *Lopez* indicates that a regulated intrastate activity's effects may be aggregated for Commerce Clause purposes only when the law at issue is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Because the Gun-Free School Zones Act was not part of such a regulatory scheme, "it [could] not, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.; see also Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (upholding regulation of homegrown wheat because it was bound up in a larger regulation of the wheat market as a

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[3] Since FACE does not have a jurisdictional element, this Court need not decide whether the aggregation analysis would apply to regulations of noneconomic intrastate activity that do have such a jurisdictional element.

whole). FACE is not part of any such regulatory scheme; therefore, the aggregation analysis is inappropriate.

As the *Lopez* Court noted, looking as a matter of course to the aggregate effects of a regulated activity on interstate commerce would make it "difficult to perceive any limitation on federal power . . . . [I]f we were to accept the Government's arguments, we [would be] hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564. If Congress can regulate abortion-related criminal activity based on its aggregate effects on the abortion industry, for instance, it also presumably has the power to regulate local zoning requirements that affect abortion clinics. *Lopez* narrowed the reach of the aggregation analysis as one important way to prevent such an expansive interpretation of Congress' authority. The panel has ignored this precedent, choosing instead to adopt an expansive, and outdated, interpretation of the Commerce Clause.

2. The panel incorrectly relied on congressional findings, which on their own are insufficient to sustain FACE's constitutionality under the Commerce Clause.

Since the aggregation analysis does not apply here, the panel's extensive reliance on congressional findings regarding the "effects" of abortion-related crime is misplaced. The panel relied heavily on such findings because it had no other option: Respondents presented no evidence whatsoever that the Petitioners' peaceful activities outside the Kalamazoo abortion clinic had a substantial effect on interstate commerce, or for that matter, even a minimal effect on any commerce at all.

Moreover, the panel's presumptive reliance on congressional findings simply disregards the holdings of *Lopez* and *Morrison* that deference to such findings is unwarranted. While congressional findings are important, they are not sufficient, as this Court made clear in *Lopez*: "'Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" *Lopez*, 514 U.S. at 557 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)). Similarly, *Morrison* emphasized that such deference to congressional findings could "completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615 (citing *Lopez*, 514 U.S. at 564). Once again, the panel failed to take *Lopez* and *Morrison* to heart, instead persisting in arguments that those cases have laid to rest.

C. THE LACK OF A JURISDICTIONAL ELEMENT FURTHER DEMONSTRATES THAT CONGRESS EXCEEDED ITS COMMERCE CLAUSE AUTHORITY WHEN IT ENACTED FACE.

Since under the *Lopez/Morrison* framework the aggregate effects of abortion-related criminal activity cannot support a claim that FACE was validly enacted, the panel's only option was to find that the particular activities regulated in this case substantially affected interstate commerce. The panel made no effort to do so, and its reason is obvious: the Petitioners' solitary sidewalk counseling outside the Kalamazoo abortion clinic did not have such far-reaching results.

If FACE had a jurisdictional element requiring a connection to interstate commerce for each particular application of the statute – a significant factor in the *Lopez/Morrison* framework – the panel would have been required to make such a finding. *See Morrison*, 529 U.S. at 612 (stating that "the second consideration that we found important . . . was that the statute contained 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce'") (quoting *Lopez*, 514 U.S. at 562). As it is, this case exemplifies why *Lopez* and *Morrison* both underscore the importance of a jurisdictional element: here federal agents were able to threaten the Petitioners with prosecution without any evidence that their activities – or even the abortion clinic's activities – had any connection whatsoever with interstate commerce.

Nonetheless, the panel erroneously concluded that "in light of the extensive congressional findings regarding the economically disruptive effects of clinic blockades and anti-abortion violence, we find that a formal jurisdictional element is unnecessary . . . ." App. 17a. This analysis turns *Lopez* and *Morrison* on their heads. Congressional findings do not make up for the lack of a jurisdictional element; to the contrary, both *Lopez* and *Morrison* emphasized the importance of a jurisdictional element as "support [for] the argument that [a statute] is sufficiently tied to interstate commerce," *Morrison*, 529 U.S. at 613, and de-emphasized the importance of Congressional findings, which are "not sufficient, by [themselves], to sustain the constitutionality of Commerce Clause legislation." *Id.* at 614; *see also Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 831 (4th Cir. 1999) ("[A]ny dictum in its previous cases notwithstanding, [the Supreme Court] had never extended the substantially affects test to uphold the regulation of a

noneconomic activity in the absence of a jurisdictional element.") (internal citations omitted) (citing *Lopez*, 514 U.S. at 560; *id.* at 580 (Kennedy, J., concurring)).

D. FACE RAISES SIGNIFICANT FEDERALISM CONCERNS.

Finally, both *Lopez* and *Morrison* seek to reinvigorate the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. The panel seems to think that this distinction rests on whether a regulated activity has local or national effects. App. 19a-21a. Once again, they misread *Lopez* and *Morrison*. The question is not whether the regulated activity has local or national effects, but whether local or national government traditionally regulates the activity. *See Morrison*, 529 U.S. 617-18; *Lopez*, 514 U.S. at 567-68 (recognizing that the local/national distinction refers to enumerated powers of Congress and unenumerated powers of local government).

The fact that states and localities have traditionally and routinely proscribed the criminal conduct regulated by FACE goes to the heart of these federalism concerns. The many state and local trespass, disorderly conduct, assault, and tort laws that regulate the specific criminal conduct covered by FACE demonstrate that punishment of such conduct has long been a truly local responsibility and is not a proper subject of congressional regulation.

In short, FACE interferes with the rights of states and local government entities to exercise the police powers entrusted to them by the Constitution. It regulates local, noneconomic criminal activity; it lacks any jurisdictional element tying its particular applications to interstate commerce; and it involves the federal government in an area

that is traditionally of local concern. As such, FACE exceeds Congress' Commerce Clause authority under *Lopez* and *Morrison*, and the panel's decision to the contrary should be reversed.[4]

II. THE PANEL'S DECISION ABROGATES THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS.

The record plainly shows that the Petitioners' activities consist of peacefully leafletting, praying, and counseling on the public sidewalk outside of a Kalamazoo abortion clinic. Regardless of whether the Petitioners engage in a "pattern of [such] activity," *see* App. 11a-12a, their right to do so is fully protected by the First Amendment. *See, e.g., Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997) ("Leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most

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[4] *Lopez* and *Morrison* both hold that Congress does not have a general police power. *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 618. In the wake of *Lopez* and *Morrison*, the constitutionality of the Hobbs Act and the federal arson statute have been called into question. *See Jones v. United States*, 529 U.S. 848, 856-58 (2000) (construing federal arson statute narrowly so as to avoid Commerce Clause difficulties posed by broader reading); *United States v. Wang*, 222 F.3d 234, 237-238, 239 (6th Cir. 2000) ("Facial constitutional challenges to the Hobbs Act followed close on the heels of *Lopez*"; holding that a criminal act directed at private citizens did not create jurisdiction under the Hobbs Act). Nonetheless, a successful challenge to FACE would not necessarily call these statutes into question, as they both contain the jurisdictional element that FACE lacks. *See* 18 U.S.C. § 844(i); 18 U.S.C. § 1951.

protected on public sidewalks, a prototypical example of a traditional public forum"); *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

The Petitioners have refrained from certain protected speech activity because of direct threats made to Petitioner Norton at a June 1, 2000, meeting attended by four federal agents, and because of subsequent correspondence that made clear the federal agents' intention to enforce FACE against the Petitioners because of their sidewalk counseling.[5] Appellants' Br. 5-15, 25-28. Despite the panel's conclusion to the contrary, App. 12a, the Petitioners' intent is clear: they intend to engage in activity that, according to federal agents, subjects them to liability under FACE. Appellants' Br. 6-15.

By failing to recognize this obvious hardship to the Petitioners, App. 12a-13a, the panel ignores the longstanding rule of law that even momentary loss of First Amendment rights constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Furthermore, it is well established that one need not await arrest or prosecution to challenge the

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[5] Because the present case implicates First Amendment rights, this Court ought to "conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). This is so "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and [this Court] must then decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.; see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (noting that in cases raising First Amendment issues appellate courts must make an independent examination of the whole record in order to ensure that lower court decisions do not infringe free speech rights).

constitutionality of government action, particularly when First Amendment rights are at stake. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

Indeed, the panel suggests that the Petitioners could avoid this hardship by "heed[ing] the government's advice and simply move their counseling activities across the street from the Clinic." App. 13a. This clearly contravenes the rule of law that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163.

The panel's decision tacitly approves intimidating police tactics that result in the loss of First Amendment rights. *See American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950) (recognizing that "indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes"); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) ("Informal measures, such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' can violate the First Amendment also.") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). The panel's decision must be reversed because of the exceptional public importance of safeguarding the First Amendment rights of law-abiding citizens, and because it conflicts with relevant decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. MUISE
Counsel of Record
KIMBERLY A. DANIELS
Thomas More Law Center
3475 Plymouth Road
Suite 100
Ann Arbor, MI 48105
734-827-2001
Fax: 734-998-4778

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00-2487

[Filed September 26, 2002]

ANNELORE B. NORTON, ET AL., Plaintiffs-Appellants,	)
v.	)
JOHN ASHCROFT, ET AL., Defendants-Appellees.	)

JUDGES:
Before MARTIN, Chief Judge, KEITH and KENNEDY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00-2487

[Filed July 31, 2002]

Annelore B. Norton and Lois Greiffendorf, *Plaintiffs-Appellants*,	)
v.	)
John Ashcroft, et al., *Defendants-Appellees*.	)

Appeal from the United States District Court
for the Western District of Michigan at Kalamazoo
No. 00-00141
Gordon J. Quist, District Judge

JUDGES:
Before MARTIN, Chief Circuit Judge; KEITH and KENNEDY, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge. Plaintiffs Annelore B. Norton and Lois Greiffendorf, anti-abortion activists, appeal the district court's determination that

(1) the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, does not, on its face, violate plaintiffs' First Amendment rights of free speech and freedom of association; (2) plaintiffs' as-applied First Amendment challenge is not ripe for judicial review; (3) Congress validly enacted the Act pursuant to its Commerce Clause powers; and, (4) the Act does not violate plaintiffs' rights under the Equal Protection Clause. We AFFIRM.

I.

This case arises out of plaintiffs' protests at the Planned Parenthood Clinic in Kalamazoo, Michigan. Norton, a volunteer nurse, and Greiffendorf, a teacher in a Roman Catholic school, regularly picketed, prayed, handed out literature, and attempted to counsel individuals who entered the Clinic. Typically, plaintiffs stood on the public sidewalk on either side of the Clinic's driveway. Although plaintiffs claim they do not intend to block access to the Clinic, on some occasions, drivers would stop in the Clinic's driveway to take a leaflet from, or speak with, one of the plaintiffs.

Concerned about potential obstruction, Clinic employees made several complaints to state and federal law enforcement. In response, the United States Marshall for the Western District of Michigan requested Norton attend a meeting with law enforcement and Clinic employees. Norton attended the meeting on June 1, 2000, along with her attorney, John Lohrstorfer. At the meeting, federal agents discussed Norton's activity in handing out leaflets and speaking with individuals in cars stopped in the Clinic driveway. The agents advised Norton that she was causing drivers to stop in the driveway, thereby impeding access to

the Clinic. Gerry Alexander, a Federal Bureau of Investigation agent, informed Norton they were concerned about a "pattern of activity" and that such a pattern could be considered a violation of the Freedom of Access to Clinic Entrances Act. The agents also informed Norton that she would not risk prosecution if she picketed, prayed and counseled across the street from the Clinic.

In a letter dated June 2, 2000, the government advised the plaintiffs that "they will need to communicate with individuals visiting the clinic at some other point - either across the street or at some other area where they are not blocking access to the clinic." Although Greiffendorf did not attend the meeting, she claims that after reading the June 2 letter, she did not resume her counseling and protesting activities outside the Clinic because she feared arrest.

Norton was not as easily dissuaded. On or about June 19, 2000, Norton returned to the Clinic and prayed on the sidewalk. She did, however, attempt to stay approximately thirty feet from the driveway, so as to avoid stopping cars. Notwithstanding the Clinic sign cautioning "For Traffic Safety Do Not Stop In Drive, Persons Outside Gate Are Not Employees of Planned Parenthood" and Norton's distance from the Clinic driveway, a car stopped in the driveway and called out to Norton. At the same time, a Clinic employee drove up behind the stopped car and began honking her horn. Concerned about arrest, Norton signaled to the first driver to move across the street. Apparently on the same day, an individual who Norton recognized as a Clinic employee, motioned for Norton to approach her car. Fearing entrapment, Norton turned and walked away from the car.

Following these incidents, Norton left the Clinic and has not returned.

After a series of letters between counsel, plaintiffs filed suit against the Attorney General, the United States Attorney for the Western District of Michigan, United States Marshal Barbara C. Lee, and FBI Agent Gerry Alexander, in their official capacity, challenging the constitutionality of the Act, and seeking declaratory and injunctive relief. After briefing and a hearing, the district court dismissed plaintiffs' seven-count complaint. Relying on the unanimous precedent of those circuits that have considered the issue, the district court dismissed plaintiffs' facial challenges to the Act. The district court declined to reach the substance of plaintiffs' as-applied challenge, finding such claims unripe for review; and, in the alternative, declined to exercise its discretion to grant declaratory relief under the Declaratory Judgment Act. The district court denied plaintiffs' request for injunctive relief.

II.

This court reviews a district court's dismissal of a complaint *de novo*. *Moore v. City of Harriman*, 272 F.3d 769, 771 (6th Cir. 2001) (en banc).

All of our sister circuits to address First Amendment facial challenges to the Act have upheld the Act. *United States v. Gregg*, 226 F.3d 253, 267 (3d Cir. 2000), *cert. denied*, 532 U.S. 971, 149 L. Ed. 2d 467, 121 S. Ct. 1600 (2001); *United States v. Weslin*, 156 F.3d 292, 297 (2d Cir. 1998), *cert. denied*, 525 U.S. 1071, 142 L. Ed. 2d 665, 119 S. Ct. 804 (1999), *United States v. Bird*, 124 F.3d 667, 683-84 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006, 140 L. Ed.

2d 320, 118 S. Ct. 1189 (1998); *Terry v. Reno*, 322 U.S. App. D.C. 124, 101 F.3d 1412, 1418-1421 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264, 138 L. Ed. 2d 193, 117 S. Ct. 2431 (1997); *United States v. Soderna*, 82 F.3d 1370, 1374-77 (7th Cir.), *cert. denied*, 519 U.S. 1006 (1996); *United States v. Dinwiddie*, 76 F.3d 913, 921-24 (8th Cir.), *cert. denied*, 519 U.S. 1043, 136 L. Ed. 2d 538, 117 S. Ct. 613 (1996); *Cheffer v. Reno, 55 F.3d 1517, 1521-22 (11th Cir. 1995); American Life League, Inc. v. Reno*, 47 F.3d 642, 648-52 (4th Cir.), *cert. denied*, 516 U.S. 809, 133 L. Ed. 2d 19, 116 S. Ct. 55 (1995). Finding their analyses persuasive, we join this uniform line of decisions and hold that the Act does not, on its face, violate the First Amendment.

A.

Plaintiffs argue that the Act only restricts the speech of abortion opponents, and is therefore a content-based restriction. A statute that regulates speech or conduct "based on hostility - or favoritism - toward the underlying message expressed" is content-based. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). The Act, however, does not directly apply to speech, but rather prohibits three types of conduct - use of force, threat of force, and physical obstruction[1] - which are not protected by

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[1] In relevant part, the Act provides that "Whoever (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with or attempts to injure, intimidate, or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the . . . civil remedies

the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 484, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."); *Cameron v. Johnson*, 390 U.S. 611, 615-17, 88 S. Ct. 1335, 20 L.E.2d 182 (1968) (rejecting First Amendment challenge to a law that prohibited obstructing access to a courthouse). Yet we recognize the Act "might incidentally affect some conduct with protected expressive elements, such as peaceful but obstructive picketing." *See American Life League*, 47 F.3d at 648; *see also Weslin*, 156 F.3d at 297.

To the extent the Act implicates protected expression, we find that it does so in a content-neutral manner. The Act prohibits interference with a variety of "reproductive health services," including all "medical, surgical, counseling or referral services relating to the human reproductive system." 18 U.S.C. § 248(e)(5) (2002). Thus, the Act prohibits interference with not only abortion-related services, it also prohibits interference with counseling regarding abortion alternatives. *See Terry*, 101 F.3d at 1419. Moreover, the Act applies to anyone who violates its terms, regardless of ideology or message. *See Weslin*, 156 F.3d at 297. Indeed, the Act has been applied to at least one pro-choice protestor who threatened workers at an anti-abortion facility. *See United States v. Mathison*, Crim. No. 95-085-FVS (E.D. Wash. 1995). As the Eighth Circuit noted, the Act "would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, 'We are underpaid!'

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provided in subsection (c)." 18 U.S.C. § 248(a) (2002).

rather than 'Abortion is wrong !'" *Dinwiddie*, 76 F.3d at 923. That most of the individuals who are prosecuted under the Act are abortion opponents is irrelevant because there is no disparate impact theory under the First Amendment. *Soderna*, 82 F.3d at 1376 ("A group cannot obtain constitutional immunity from prosecution by violating a statute more frequently than any other group.").

As a content-neutral restriction, the Act must withstand intermediate scrutiny. *Gregg*, 226 F.3d at 268. A statute passes intermediate scrutiny "[1] if it furthers an important or substantial government interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L.E.2d 672 (1968). Initially, the Act, at a minimum, furthers an important government interest in ensuring access to reproductive health services, an interest unrelated to any incidental suppression of free expression. *See Dinwiddie*, 76 F.3d at 924. The Act only "forbids physical interference with people going about their own lawful private business," *id.*, and both specifically exempts protected First Amendment activity and leaves open "ample alternative means for communication," *Terry*, 101 F.3d at 1420. Therefore, we are satisfied that the Act easily passes muster under *O'Brien*.

B.

Plaintiffs also contend that the Act is impermissibly vague. A statute is unconstitutionally vague if it does not give a "person of ordinary intelligence a reasonable opportunity to

know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Every circuit court to address this challenge has ruled that the Act is not impermissibly vague. *Bird*, 124 F.3d at 684; *Terry*, 101 F.3d at 1421; *Soderna*, 82 F.3d at 1376-77; *Dinwiddie*, 76 F.3d at 924; *Cheffer*, 55 F.3d at 1521-22; *American Life League*, 47 F.3d at 653. We agree.

Relatedly, plaintiffs also mount an overbreadth challenge to the Act. A statute is overbroad only if "it reaches a substantial number of impermissible applications." *New York v. Ferber*, 458 U.S. 747, 771, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *see also Deja Vu of Nashville, Inc. v. Met. Gov't of Nashville*, 274 F.3d 377, 387 (6th Cir. 2001). The Act prohibits only a limited range of conduct - the use or threat of force, or non-violent physical obstruction, intended to prevent access to, or the provision of, reproductive services. *See Terry*, 101 F.3d at 1421. Contrary to plaintiffs' assertion, the Act does not apply to "any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1) (2002). Therefore, we conclude the Act is not impermissibly overbroad.

III.

A.

The district court dismissed plaintiffs' as-applied challenge pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. A court lacks jurisdiction over the subject matter if the claim is not yet ripe for judicial review. *Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 160 (6th Cir.

1992). Ripeness doctrine exists "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Deja Vu*, 274 F.3d at 399 (quoting *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1057 (6th Cir. 1999)). In order to determine whether a claim is ripe, this court examines (1) the likelihood that the harm alleged will ever come to pass; (2) whether the factual record is sufficiently developed to allow for adjudication; and, (3) hardship to the parties if judicial review is denied. *Adult Video Ass'n v. United States*, 71 F.3d 563, 568 (6th Cir. 1995). For pre-enforcement challenges, a case is ordinarily ripe for review "only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Nat'l Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997) (citations and internal punctuation omitted). In a First Amendment pre-enforcement challenge, the inquiry usually focuses on how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute. *Id. at 285*. Although the ripeness requirement is somewhat relaxed in the First Amendment context, there nonetheless must be a credible fear of enforcement. *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 479 (2d Cir. 1999).

Given these guidelines, we find that plaintiffs' as-applied challenge is not yet ripe for review. First, assuming plaintiffs have sufficiently alleged unconstitutional harm, they have not established that such alleged harm will ever come to pass. In the June 1, 2000, meeting the government indicated that it was concerned about a "pattern of activity." Plaintiffs have not, however, engaged in such a "pattern of activity." While in certain circumstances, an unequivocal intention to

engage in such a "pattern of activity" might suffice for ripeness purposes, the Act is a specific intent statute. Accordingly, application of the Act depends not only on the existence of such a "pattern of activity," but on specific facts demonstrating that plaintiffs acted with the requisite specific intent. In the present case, this inquiry is further complicated by the fact that plaintiffs have professed an intention to comply with the Act. Under these circumstances, we cannot conclude that plaintiffs have sufficiently demonstrated that the alleged harm will ever come to pass.

Along the same lines, plaintiffs cannot show that the current factual record is sufficiently developed to permit review. As noted above, the government indicated that it might consider a "pattern of activity" to be a violation of the Act. But plaintiffs have not engaged in such a pattern, and without a concrete set of facts, we would be forced to speculate regarding the specific components of a "pattern of activity" and the likelihood that the Act might be applied to them. Under these circumstances, it would be impossible to evaluate plaintiffs' claim that the Act, as applied to them, violates the First Amendment.

Finally, withholding judicial relief does not result in undue hardship to the plaintiffs. Although plaintiffs claim they were intimidated from resuming their counseling, picketing, and praying activities at the Clinic, the meeting did not deter Norton, who resumed counseling on June 19. Even accepting plaintiffs' professed uncertainty about counseling on the section of the sidewalk immediately adjacent to the Clinic, some uncertainty inheres in conduct - even conduct motivated only by the strongest moral convictions - along "the boundaries of the criminal law." *Adult Video Ass'n*, 71 F.3d

at 568. Such uncertainty does not rise to the level of undue hardship. *Id.* Notably, if plaintiffs wish to avoid this uncertainty, they can heed the government's advice and simply move their counseling activities across the street from the Clinic.

In light of the foregoing, we hold that the district court correctly concluded that plaintiffs' as-applied challenge is not ripe for review and properly dismissed their challenge for lack of subject matter jurisdiction.

B.

In a footnote, plaintiffs assert that they have standing to assert the First Amendment rights of individuals entering the Clinic who may wish to speak with them. Ordinarily, a party does not have standing to assert the rights of third parties. *In re Troutman Enterp., Inc.* (*Harker v. Troutman*), 286 F.3d 359, 364 (6th Cir. 2002). In order to avoid this general rule, the litigant must show that "it has suffered a concrete, redressable injury, that it has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 289 n.6 (6th Cir. 1998). Plaintiffs do not allege any facts regarding their allegedly close relation with these third parties or the existence of some impediment to the ability of these third parties to protect their rights. Therefore, we find that plaintiffs lack standing to assert the rights of third-party Clinic patients or prospective patients.

IV.

"Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000); *see also United States v. Faasse*, 265 F.3d 475, 481 (6th Cir. 2001) ("We may only invalidate a congressional enactment passed pursuant to the Commerce Clause if it bears no rational relation to interstate commerce."). The Commerce Clause empowers Congress to "regulate Commerce . . . among the several states." U.S. Const., Art. I, § 8, cl. 3. It permits Congress to regulate three categories of conduct: 1) "the use of the channels of interstate commerce"; 2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and 3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 131 L.E.2d 626 (1995). In *Morrison*, which involved this third category of regulation, the Court identified four relevant considerations: 1) the economic nature of the activity; 2) a jurisdictional element limiting the reach of the law to a discrete set of activities that has an explicit connection with, or effect on, interstate commerce; 3) express congressional findings regarding the regulated activity's effects on interstate commerce; and (4) the link between the regulated activity and interstate commerce. 529 U.S. at 610-12.

All eight circuits to address the issue have held that Congress validly enacted the Act pursuant to its Commerce Clause authority. *Gregg*, 226 F.3d at 262-63; *Weslin*, 156

F.3d at 296; *Hoffman v. Hunt*, 126 F.3d 575, 582-88 (4th Cir. 1997); *Bird*, 124 F.3d at 672-82; *Terry*, 101 F.3d at 1415-18; *Soderna*, 82 F.3d at 1373-74; *Dinwiddie*, 76 F.3d at 920; *Cheffer*, 55 F.3d at 1519-21. Nevertheless, plaintiffs contend that the Supreme Court's recent invalidation of the Violence Against Women Act's civil remedy provision requires reversal of the district court's decision that the Act was validly enacted pursuant to Article I, Section 8. *See Morrison*, 529 U.S. at 613. In particular, plaintiffs contend that *Morrison* calls into question the uniform body of pre-*Morrison* caselaw upholding the Act, and that the Act does not pass muster under *Morrison*'s four-factor test.

At the outset, we reject plaintiffs' initial contention that *Morrison* calls into question the uniform body of cases upholding the Act against Commerce Clause challenges. Rather than breaking new Commerce Clause ground, *Morrison* derived its four-factor framework directly from *Lopez*. *Id.* at 609 ("Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of [the civil remedy provision of the Violence Against Women Act]."); *see also Faase*, 265 F.3d at 482 (characterizing *Morrison* as elaborating upon *Lopez*); *United States v. Corp*, 236 F.3d 325, 331-33 (6th Cir. 2001) (applying four-part *Lopez* test in light of *Morrison*).

We are also satisfied that the Act withstands scrutiny under *Morrison*. In particular, we find the Third Circuit's application of the *Lopez/Morrison* four-factor test and its examination of the Act's extensive congressional findings persuasive. *See Gregg*, 226 F.3d at 261-67. Initially, we find

that the Act, unlike the Violence Against Women Act's civil remedy provision, regulates activity - "the physical obstruction and destruction of reproductive health clinics and the intentional interference and intimidation of persons obtaining and providing reproductive health services" - that has a direct economic effect. *Id.* at 262. Express congressional findings underlying the Act plainly demonstrate that violent and obstructive acts directed at reproductive health facilities resulted in millions of dollars in damage, forced reproductive health clinics to close, delayed medical services, and intimidated numerous physicians from offering abortion services. S. Rep. No. 103-117, at 14 (1993); H.R. Rep. No. 101-306, at 7 (1993), *reprinted in* 1994 U.S.C.C.A.N, 699, 704. While the activity prohibited by the Act might be motivated by non-commercial sentiment - namely, staunch moral opposition to abortion - the effect of this activity is unambiguously and directly economic. Thus, in our view, such conduct is properly considered commercial activity. *See Gregg*, 226 F.3d at 262 (ruling that the Act prohibits commercial activity); *Hoffman*, 126 F.3d at 587 (noting that the regulated activity is "closely connected with, and has a direct and profound effect on, the interstate commercial market in reproductive health care services."); *Dinwiddie*, 76 F.3d at 921 ("FACE prohibits interference with a commercial activity - the provision and receipt of reproductive health services."); *Cheffer*, 55 F.3d at 1520 ("The Access Act does regulate commercial activity, the provision of reproductive health services."). And as our sister circuits have ruled, Congress can properly counter such conduct with legislation pursuant to the Commerce Clause.

The Act, which was enacted prior to the Supreme Court's decisions in *Lopez* and *Morrison*, does not contain a

formal jurisdictional element, *see Gregg*, 226 F.3d at 263, "a clause that purports to ensure that the law only covers activity that has a substantial effect on interstate commerce." *Corp*, 236 F.3d at 330 (quoting *United States v. Rodia*, 194 F.3d 465, 468 (3d Cir. 1999)). Although plaintiffs place considerable emphasis on this element, neither *Morrison* nor *Lopez* held that a congressional enactment would fail deferential Commerce Clause review without a formal jurisdictional element. Rather, a jurisdictional element "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." *Morrison*, 529 U.S. at 612; *see also Lopez*, 514 U.S. at 562 (stating the act contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."). By the same measure, a jurisdictional element does not guarantee that a particular enactment will pass muster. *See Corp*, 236 F.3d at 331. In light of the extensive congressional findings regarding the economically disruptive effects of clinic blockades and anti-abortion violence, we find that a formal jurisdictional element is unnecessary because the proscribed activity targets "reproductive health clinics that are, by definition, directly engaged in the business of providing reproductive health services." *Gregg*, 226 F.3d at 263; *see also Bird*, 124 F.3d at 678 ("Consistent with *Lopez*'s admonition, we note that the presence of a national commercial market in abortion-related services, together with the effects on such market of the proscribed conduct, serves as a limiting principle circumscribing Congress's regulation of intrastate activity under the Act."); *Terry*, 101 F.3d at 1418 ("*Lopez*'s fundamental proposition is that Congress must ensure that its Commerce Clause power to regulate noncommercial activities

extends to only those activities that substantially affect interstate commerce. Congress may do so either through its own legislative findings or by including a jurisdictional element in the statute; it need not do both.").

Morrison also instructs us to consider any congressional findings that a particular activity burdens interstate commerce. 529 U.S. at 612. Of course, the constitutionality of a particular enactment is "ultimately a judicial rather than a legislative question," *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 13 L.E.2d 258 (1964) (Black, J., concurring)), but such findings may "enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce." *Morrison*, 529 U.S. at 612 (citation omitted). Both the Senate Judiciary Committee and the House Committee on Labor and Human Resources submitted extensive reports detailing that clinic blockades and violent anti-abortion protests burdened interstate commerce. *See Gregg*, 226 F.3d at 263; *Bird*, 47 F.3d at 678. Thus, in evaluating the constitutionality of the Act we are mindful of the informed judgment of our congressional counterparts.

Finally, the fourth *Morrison* factor directs us to assess the link between the regulated activity and interstate commerce. 529 U.S. at 612. In making this assessment of the Act, we first examine the interstate nature of the market for reproductive health services and then examine congressional findings regarding how the activity prohibited by the Act burdens interstate commerce.

With respect to this first inquiry, the legislative record indicates that there is a national market for abortion services. *See Gregg*, 226 F.3d 253, 263-64; *Bird*, 124 F.3d at 678. Owing to a national shortage in reproductive health services where only 17% of counties have an abortion provider, H.R. Rep. No. 103-306, at 8, U.S.C.C.A.N., at 705, patients must often travel interstate to obtain reproductive health services. S. Rep. No. 103-117, at 31; H.R. Rep. No. 103-603, at 10, U.S.C.C.A.N., at 707. For example, the Senate found that 44% of patients treated at a Wichita, Kansas clinic were from out of state. S. Rep. No. 103-117, at 31. According to the congressional record, this shortage is particularly severe in rural counties because most abortion providers are located in metropolitan areas. H.R. Rep. No. 103-306, at 8, U.S.C.C.A.N., at 705. Moreover, abortion opponents are particularly likely to target rural reproductive health service providers because elimination of such a provider can eliminate abortion services for all women in a geographic area. *Id.*

As a consequence of this national shortage in reproductive health providers, physicians must also engage in interstate commerce. The Senate noted that physicians travel interstate and that some physicians perform abortion-related services in more than one state. S. Rep. No. 103-117, at 31. For example, the Senate noted that one physician from Minnesota provided abortion services in Minnesota, Montana, North Dakota, and parts of Canada. *Id.* at n. 46.

In addition, the Senate also found that reproductive health clinics engage in interstate commerce because they "purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other

States; they employ staff; they own and lease office space; they generate income." *Id.* at 31.

As to the link between the regulated activity and interstate commerce, Congress concluded that the clinic blockades and violent protests proscribed by the Act forced clinics to close, caused harmful delays in the provision of medical services, increased health risks to patients, S. Rep. No. 103-117, at 14-15 and caused millions of dollars of damage to reproductive health facilities, H.R. Rep. No. 103-306, at 7, U.S.C.C.A.N., at 704. Threats of violence also decreased physicians' willingness to perform abortions. S. Rep. No. 103-117, at 14; H.R. Rep. No. 103-306, at 8, U.S.C.C.A.N., at 705. The Senate Committee noted that the violence "has . . . taken a severe toll on providers, intimidated some into ceasing to offer abortion services, and contributed to an already acute shortage of qualified abortion providers." S. Rep. No. 103-117, at 14. For example, at least three physicians in Dallas stopped performing abortions in 1992 as a result of pressure by an anti-abortion group; two doctors in Melbourne, Florida stopped working in 1993 after receiving death threats; and, since Dr. Gunn, an abortion-provider in Florida, was shot in 1993, at least eight more doctors have stopped offering abortion services. *Id.* at 16-17. The House Committee reported similar conclusions, characterizing the provider shortage as "at least partially attributable to the violence and intimidation described in [the] report." H.R. Rep. No. 103-306, at 8, U.S.C.C.A.N. at 705. According to the record, "Doctors understandably are leaving the field, and new graduates have little desire to enter the field even as part of a wider obstetrics/gynecology practice." *Id.*

In addition to the documented economic disruption of clinic blockades and violent protests, Congress also found that this conduct was driven by a nationally unified and nationally coordinated anti-abortion movement. Congress found that many of these activities were organized and directed across state lines, and that the problem was increasingly beyond the scope of local and state authorities. H.R. Rep. No. 103-306, at 9, U.S.C.C.A.N., at 706.

Given the detailed congressional record, we are satisfied that Congress had a rational basis to conclude that the activities prohibited by the Act disrupted the national market for abortion-related services and decreased the availability of such services. *See Gregg*, 226 F.3d at 263-64. Considered along with the other *Morrison* factors, we hold that Congress validly enacted the Act pursuant to its Commerce Clause power.

V.

Finally, plaintiffs argue that the Act targets only anti-abortion groups and therefore violates the Equal Protection Clause. We find this argument meritless because plaintiffs do not constitute a suspect class, the Act does not infringe on plaintiffs' First Amendment rights, and Congress plainly had a rational basis in enacting the Act. *See Terry*, 101 F.3d at 1422. We therefore affirm the district court's dismissal of plaintiffs' equal protection claim.

VI.

For the foregoing reasons, we AFFIRM the decision of the district court dismissing plaintiffs' constitutional

challenges to the Act and its denial of declaratory and injunctive relief.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MICHIGAN, SOUTHERN DIVISION

No. 4:00-CV-141

[Filed November 24, 2000]

ANNELORE B. NORTON AND LOIS GREIFFENDORF,
Plaintiffs,

v.

JANET RENO, et al.,
Defendants.

JUDGES:
GORDON J. QUIST, UNITED STATES DISTRICT JUDGE.

OPINION

On August 28, 2000, Plaintiffs, Annelore B. Norton ("Norton") and Lois Greiffendorf ("Greiffendorf"), filed this action against Defendants, Janet Reno, Attorney General of the United States, Michael H. Dettmer, United States Attorney for the Western District of Michigan, Barbara C. Lee ("Lee"), United States Marshal for the Western District

of Michigan and Gerry Alexander ("Alexander"), Special Agent, Federal Bureau of Investigation, Kalamazoo, Michigan, all in their official capacities ("Defendants"). Plaintiffs seek declaratory and injunctive relief from enforcement of the "Freedom of Access to Clinic Entrances Act" ("FACE"), 18 U.S.C. § 248.[1] A first non-violent physical obstruction offense under FACE carries the potential for up to a six month prison sentence and a $ 10,000 fine. See 18 U.S.C. § 248 (b).

Plaintiffs allege seven claims for relief in their complaint. The first two claims challenge FACE as applied, and the other five present facial challenges to FACE. Plaintiffs' claims are as follows: first, that the threatened application of FACE violates Plaintiffs' and other parties' First Amendment right to free speech; second, that the threatened application of FACE violates Plaintiffs' and other parties' right to free association guaranteed by the First Amendment; third, that FACE is unconstitutionally overbroad in violation of the First Amendment; fourth, that FACE is unconstitutionally vague in violation of the First and Fifth Amendments; fifth, that FACE is a content and viewpoint

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[1] FACE provides in relevant part that "Whoever (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services ... shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c)." 18 U.S.C. § 248(a). "Reproductive health services" is defined in Section (e)(5) of FACE.

based restriction of speech in violation of the First Amendment; sixth, that FACE violates the Fifth Amendment in denying equal protection of law; and seventh, that in enacting FACE Congress exceeded its power under the Commerce Clause. Now before the Court are Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss Plaintiffs' Complaint. For the reasons set forth below, Plaintiffs' motion will be denied, and Defendants' motion will be granted.

Facts

This case arises out of the activities of Plaintiffs in protesting, praying and counseling on the sidewalks around the Planned Parenthood Clinic in Kalamazoo, Michigan ("Clinic"). Plaintiffs are two individuals who are active in protesting abortions and counseling women who may be seeking abortions. Plaintiffs claim that even though they do not intend to block access to any abortion clinic, federal law enforcement officials have threatened them with prosecution for what Plaintiffs believe to be the exercise of their First Amendment rights. Plaintiffs also claim that Congress does not have authority under the Commerce Clause to regulate access to what Plaintiffs see as a purely personal and local matter.

Norton is a nurse, and Greiffendorf is a teacher in a Roman Catholic school. As part of their activity, Plaintiffs pray and picket in front of the Clinic. Greiffendorf goes to the Clinic with her students to pray. As another part of their activity, Plaintiffs pass out literature and counsel people who are trying to enter or exit the Clinic's parking lot regarding

Plaintiffs' views on abortion and the consequences of abortion.

Even though Plaintiffs claim that they have no intention of blocking the access to the Clinic, from time to time when Plaintiffs are engaged in their counseling activities, a vehicle might stop in the Clinic driveway to receive literature or to talk with one of the Plaintiffs. This could possibly block access to another vehicle attempting to enter the Clinic's parking area.

Plaintiffs have drawn the attention of federal law enforcement officials, specifically the United States Marshal's Service and the Federal Bureau of Investigation. At the suggestion of Lee, Norton and her attorney, John Lohrstorfer, agreed to meet with Lee to discuss possible ways to resolve any conflict relating to Norton's activities outside the Clinic. The parties met on June 1, 2000. At the meeting were Norton, Lohrstorfer, Lee, Alexander, Scott Mastellar, a Deputy with the U.S. Marshals Service, an intern from the U.S. Marshals Service, Meg Smilie of Planned Parenthood and Robert Lohrman, an attorney for Planned Parenthood. At this meeting, Defendants Lee and Alexander informed Norton of FACE and their intent to enforce FACE. The federal authorities told Norton that she would have no problem with FACE if she picketed, prayed and counseled across the street from the Clinic. The law enforcement agents were vague about what they would consider enough evidence to assert a violation of FACE. For example, if a vehicle stopped in Planned Parenthood's driveway to receive literature from one of the Plaintiffs, would that, by itself, constitute a violation of FACE? Or, would a violation occur if one person stopped in

a car to receive literature and inadvertently blocked another driver wanting to use the driveway?

Plaintiff Greiffendorf did not attend the June 1, 2000 meeting, but learned what had been said in that meeting, and also read a letter dated June 2, 2000, to Mr. Lohrstorfer from Defendants Lee and Alexander. This letter was meant to "address the potential violation of the FACE statute as it applied to the current activities [of Plaintiffs]"; it stated that "due to the fact that there is a limited public driveway easement, ... they [sidewalk counselors] will need to communicate with individuals visiting the clinic at some other point--either across the street or at some other area where they are not blocking access to the clinic." (Letter from Lee and Alexander to Lohrstorfer of 6/2/2000 at 1, Defs.' Mot. Dis. Compl. Ex. 3).

While Greiffendorf had previously engaged in sidewalk prayer, picketing and counseling, at times accompanied by her students, subsequent to hearing about the meeting and reading the letter she decided not to return to the sidewalks in front of the Clinic for fear, she claims, of her and her students being arrested and convicted under FACE.

Norton was not as easily dissuaded. On or about June 19, 2000, Norton traveled to the Clinic and prayed on the sidewalk. She did, however, attempt to stay approximately thirty feet from the driveway, so as to avoid stopping cars. In spite of the fact that the Clinic has posted a sign in the driveway which reads, "For Traffic Safety Do Not Stop In Drive, Persons Outside Gate Are Not Employees of Planned Parenthood," and in spite of Norton's distance from the driveway, a car stopped in the driveway and its driver called

out to Norton. At that time, an employee of the Clinic drove up behind the stopped car, and the driver of the second car began honking her horn. In fear of being arrested for a FACE violation, Norton signaled the first driver to go across the street to speak with her. Apparently on the same day, another such incident occurred, but this time Norton recognized the driver who had motioned for her to approach the car as an employee of the Clinic, and so, fearing that the driver was attempting to entrap her into a violation of FACE, Norton turned and walked away from the car. Following these incidents, Norton left the Clinic and has not returned. Norton claims that she is afraid that any occurrence such as what happened on her last visit to the Clinic could result in her arrest and conviction for violating FACE.

Analysis

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court will first examine Defendants' motion to dismiss under Rule 12(b)(6), as applied to Counts 3-7 of Plaintiffs' Complaint (Plaintiffs' facial challenges to FACE). Finding that FACE is constitutional, the Court will grant Defendants' motion on Counts 3-7 because those counts fail to state a claim. The Court will then examine Defendants' motion to dismiss under Rule 12(b)(1) as regards Counts 1 and 2. As to those counts, the Court will grant Defendants' motion on the grounds that these claims are not currently ripe. Alternatively, the Court will exercise its discretion and decline to decide Counts 1 and 2 under the Declaratory Judgment Act.

I. Defendants' Motion to Dismiss as to Counts 3-7

Defendants argue that Plaintiffs' Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The moving party has the burden of proving that no claim exists. Although a complaint is to be liberally construed, it is still necessary that the complaint contain more than bare assertions of legal conclusions. *See Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993)(citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). All factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in favor of the non-moving party. *See* 2A James W. Moore, *Moore's Federal Practice*, P 12.34[1][b] (3d ed. 1997). The Court need not, however, accept unwarranted factual inferences. *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984)(citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957)).

Plaintiffs' claims in Counts 3-7, which make facial challenges to FACE, are currently ripe for review. *See Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995). *Cheffer* involved a facial challenge to FACE. The plaintiffs in that case engaged in trying to persuade women not to seek abortions, distributed literature, orally protested, and engaged in sidewalk counseling. Like the instant Plaintiffs, the *Cheffer* plaintiffs alleged that their First Amendment rights had been "chilled" because they feared punishment under FACE for

their expressive activity in opposition to abortion. Like the instant Plaintiffs, the *Cheffer* plaintiffs did not assert that the exercise of their religion required them to physically obstruct abortion clinic entrances. The Eleventh Circuit found that the *Cheffer* plaintiffs' Eighth Amendment claim (cruel and unusual punishment and excessive fines) was not ripe for adjudication but also found that their First Amendment claims (free exercise and free expression) were ripe. The court noted that "the doctrine of ripeness is more loosely applied in the First Amendment context. Appellants' First Amendment claims allege that the Act currently 'chills' specific protected expressive activities and, thus, present sufficiently concrete and immediate questions for review." *Id.* at 1523 n.12 (citation omitted). The instant facts fall squarely under the court's ruling in *Cheffer*.

As to the merits of Plaintiffs' challenges to FACE on Counts 3-7, United States Courts of Appeals considering FACE have uniformly upheld it against the type of constitutional challenges Plaintiffs raise here. These courts have held, and this Court agrees that, FACE is content neutral and is a restriction on the time, place and manner of speech that is "narrowly tailored to serve a significant governmental interest," and allows ample alternative means of communication, as is required of content-neutral restrictions on the time, manner, and place of speech under *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989), and of limitations on expressive conduct under *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct.1673, 20 L. Ed. 2d 672 (1968). *See United States v. Gregg*, 226 F.3d 253, 267-68 (3d Cir. 2000); *United States v. Weslin*, 156 F.3d 292, 296-98 (2d Cir. 1998)(per curiam); *Terry v. Reno*, 322 U.S. App. D.C. 124, 101 F.3d 1412,

1418 (D.C. Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913, 921-24 (8th Cir. 1996); *Cheffer*, 55 F.3d at 1521-22; *American Life League Inc. v. Reno*, 47 F.3d 642, 648-52 (4th Cir. 1995). *See also Hill v. Colorado*, 530 U.S. 703, 147 L. Ed. 2d 597, 120 S. Ct. 2480, 2491-97 (2000) (holding that a Colorado law prohibiting anyone within 100 feet of the entrance to a health-care facility from knowingly approaching within eight feet of another person, without the other person's consent, for such purposes as leafleting, protesting, or counseling with that person, is a valid time, place and manner restriction on speech under *Ward*). Plaintiffs have no constitutional right to interfere with access to the Clinic. *See, e.g., American Life League v. Reno*, 47 F.3d at 648 (citing *Cameron v. Johnson*, 390 U.S. 611, 617, 88 S. Ct. 1335, 1339, 20 L. Ed. 2d 182 (1968)); *Dinwiddie*, 76 F.3d at 921-22 (citing *Cameron v. Johnson*); *Terry v. Reno*, 101 F.3d at 1418-19 ("Consistent with the First Amendment, the Government may also punish physical obstruction that makes passage to or from a reproductive health facility impossible or unreasonably hazardous")(citing *Cameron v. Johnson*). Moreover, FACE is not overbroad. *See United States v. Bird*, 124 F.3d 667, 683 (5th Cir. 1997); *Dinwiddie*, 76 F.3d at 924; *Cheffer*, 55 F.3d at 1521-22; *American Life League*, 47 F.3d at 652-53; *Riely v. Reno*, 860 F. Supp. 693, 704 (D. Ariz. 1994); *See also Hill v. Colorado*, 120 S. Ct. at 2497-98 (Colorado statute is not overbroad). It is not vague. *See Dinwiddie*, 76 F.3d at 924; *Cheffer*, 55 F.3d at 1521-22; *American Life League*, 47 F.3d at 652-53; *Riely*, 860 F. Supp. at 705; *see also Hill v. Colorado*, 120 S. Ct. at 2498-99 (Colorado statute is not vague). It does not violate the Equal Protection Clause. *See Terry*, 101 F.3d at 1422. Finally, it is within Congress' commerce power. *See Gregg*, 226 F.3d at 261-67; *Bird*, 124 F.3d at 672-82; *Terry*, 101

F.3d at 1415-18; *United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir. 1996); *Dinwiddie*, 76 F.3d at 919-21; *United States v. Wilson*, 73 F.3d 675, 679-89 (7th Cir. 1995); *Cheffer*, 55 F.3d at 1519-21.

Of the cases cited above as upholding FACE as a valid exercise of the commerce power, only *Gregg* was decided after the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). In *Morrison*, the Court made clear that its decision in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626(1995), striking down the Gun-Free School Zones Act of 1990 as exceeding Congress' commerce power, was not an isolated, confined case but rather one with potentially substantial impact on all Commerce Clause analyses. In *Morrison*, the Court struck down a portion of the Violence Against Women Act, 42 U.S.C. § 13981(VAWA), as exceeding Congress' commerce power. Congress may regulate under its commerce power: (1) channels of interstate commerce, (2) instrumentalities of or persons or things in interstate commerce, and (3) activities substantially affecting interstate commerce. *See Morrison*, 120 S. Ct. at 1749. However, *Morrison* dealt only with the third category of activity, *see id.*, so the only possible change to be worked in the Commerce Clause analysis of FACE after *Morrison* is in activities substantially affecting interstate commerce.

Morrison, in striking down a portion of VAWA, stated, "we accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 1754.

This points out the difference between the conduct regulated in *Morrison* and the conduct regulated in the instant case. Unlike the conduct sought to be proscribed in VAWA, the conduct proscribed under FACE is not "noneconomic." As the Court pointed out in *Morrison*, allowing Congress to regulate crime against women on the basis of the secondary effects such crime has on the economy (e.g. "'deterring potential victims from traveling interstate, from engaging in employment in interstate business, ... by diminishing national productivity.'" *Id.* at 1752 (quoting H.R. Conf. Rep. No. 103-711, at 385, U.S. Code Cong. & Admin. News 1994, pp. 1803, 1853)) would allow Congress to regulate criminal law in general, as well as other areas of law traditionally reserved to the states, such as family law, and would thereby possibly "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 1752-53. Allowing Congress to regulate access to reproductive health services, however, provides no threat of obliterating this distinction in the Constitution. Reproductive health services are, as Congress noted in its findings in regards to FACE, businesses which engage in interstate commerce at numerous levels. The doctors who perform abortions often travel interstate in the performance of their duties, as do patients and the goods and supplies used in abortion clinics. *See American Life League*, 47 F.3d at 647 (citing Congressional findings on these issues). Regulating commercial facilities which engage in interstate commerce is quite different from regulating crime against another individual on the basis of gender. Reproductive health facilities have a *direct* and *substantial* affect on interstate commerce. Allowing Congress to regulate these crimes does not require a "but-for causal chain from the initial occurrence of ... crime ... to every attenuated effect upon interstate commerce," *Morrison*, 120 S. Ct. at 1752, but is based on

direct and substantial effects on interstate commerce. *See, e.g., United States v. Gregg*, 226 F.3d at 263-64; *Dinwiddie*, 76 F.3d at 921; *American Life League v. Reno*, 47 F.3d at 647. Allowing Congress to enact FACE does not threaten to "obliterate the Constitution's distinction between national and local authority," *Morrison*, 120 S. Ct. at 1752, and is, therefore, within Congress' commerce power.

United States v. Faasse, 227 F.3d 660 (6th Cir. 2000), struck down a portion of the Child Support Recovery Act of 1992 (CSRA) as exceeding Congress' commerce power. In its analysis of the third prong of activities which Congress may regulate under its commerce power, activities substantially affecting interstate commerce, the court noted that "the activity criminalized by the CSRA is not commercial in nature," due to its lack of reciprocity--"the mutual exchange of value motivated by economic self-interest." *Id.* at 669-70. In the instant case, however, as the Court has mentioned, clinics of the type at issue here are engaged in interstate commerce, and their obligations, unlike the obligations in *Faasse*, are in fact reciprocal. Their obligations are not based on a state court order, but instead on mutual promises and bargains by suppliers, doctors, patients, and other employees. This type of scenario was lacking in *Faasse, see id.* at 670 ("The failure to obey a state court order, of course, lacks this essential feature of reciprocity"), but is present in the instant case. Accordingly, *Faasse* provides the Plaintiffs with no additional support for the argument that FACE exceeds Congress' commerce power.

FACE is constitutional. As to Plaintiffs' Counts 3-7, Defendants' motion will be granted.

II. Defendants' Motion to Dismiss as to Counts 1 and 2

Pursuant to Fed. R. Civ. P. 12(b)(1), this Court must dismiss a claim if the Court lacks jurisdiction over the subject matter. A court lacks jurisdiction over the subject matter if there is no actual case or controversy under art. III, § 2 of the Constitution. *See Bigelow v. Michigan Dep't of Nat. Resources*, 970 F.2d 154, 160 (6th Cir. 1992)(equating dismissal on ripeness grounds to lack of subject matter jurisdiction). In addition, this Court has discretion on whether to hear a claim for a declaratory judgment pursuant to 28 U.S.C. § 2201(a).

Defendants claim that there is no case or controversy because Plaintiffs' claim is not "ripe" for adjudication.[2] Three factors should be taken into account in determining whether a pre-enforcement challenge to a statute is ripe. These factors are "the hardship to the parties if judicial review is denied at the pre-enforcement stage, the likelihood that the injury alleged by the plaintiff will ever come to pass, and the fitness of the case for judicial resolution at this stage." *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 529 (6th Cir. 1998); *see also Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 400 (6th Cir. 1998)(same). Plaintiffs' facial challenges met these factors, while their as applied challenges do not.[3]

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[2] The question of "ripeness" is one element of determining whether there is an actual case or controversy between the parties.

[3] As to Counts 1 and 2, *Peoples Rights Organization* is distinguished from the instant case in that the plaintiffs in *Peoples*

FACE is a specific intent statute. Specific intent cannot be ascertained by a clear statutory definition or by reading someone's mind. It can only be ascertained by considering all of the surrounding facts and circumstances. Plaintiffs say that they do not intend to block access, and the Defendants refuse to state what would be sufficient evidence to charge Plaintiffs with blocking access. Thus, to a certain extent, the parties are engaging the Court in "abstract disagreements" which *Peoples Rights Organization* recognizes are not ripe for decision. *See Peoples Rights Org.*, 152 F.3d at 527. The problem is that this Court is left to speculate upon what specific acts of Plaintiffs might cause Defendants to arrest Plaintiffs. For example, if Norton were praying 30 feet from the driveway and an employee of Planned Parenthood stopped her vehicle to entice Norton into a conversation, and the vehicle blocked another vehicle trying to enter the Clinic's parking lot, in this Court's judgment, Norton would not intentionally be blocking access but the Planned Parenthood employee could be intentionally blocking access if the employee did not move on. Likewise, this Court does not believe that the number of individual vehicles that stop for "counseling" on the way into the Clinic's property is determinative of any intent to block access so long as no access is actually blocked, no one is intimidated, etc. But it could possibly have some relevance regarding "intent" in

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Rights Organization claimed that the statutory definition of "assault rifle" was vague and they did not want to unknowingly violate the ordinance. In the instant case, however, the definition of what is illegal is not vague. Plaintiffs do not even claim that it is vague. The problem is in determining what specific acts of Plaintiffs will lead reasonable law enforcement officers to conclude that a Plaintiff had the specific intent required to violate the statute.

light of other facts which are only speculative at this time. On the other hand, standing in the Clinic's driveway or entrance to stop a vehicle or pedestrian from entering the Clinic's property would be intentionally blocking access in violation of FACE. There is a wide range of activity in between these hypotheticals, but the Court would only be speculating upon whether these activities would cause reasonable law enforcement officers to arrest anyone.

Because of the specific intent requirement, Plaintiffs do not meet any prong of the Sixth Circuit's test for pre-enforcement ripeness on their as applied challenges.

Plaintiffs face no hardship. They have no constitutional right to intentionally block access to the Clinic, and this Court cannot grant Plaintiffs absolute immunity from FACE for future actions, even if those actions accord exactly with their past actions, since an act that may not evidence intent on one occasion may be evidence of intent on another occasion simply because surrounding circumstances change. Plaintiffs can counsel, pray, and picket so long as they do not violate FACE.

The second ripeness factor to be considered is whether the harm Plaintiffs allege may come to pass. When considering this factor, it must be recognized that "the more that the question presented is purely one of law, [as are Plaintiffs' facial challenges] and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice versa." *Artway v. Att'y Gen. of N.J.*, 81 F.3d 1235, 1249 (3rd Cir. 1996)(citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81-82, 98 S. Ct. 2620, 2634-35, 57 L. Ed. 2d 595 (1978) and *Zemel v.*

Rusk, 381 U.S. 1, 20, 85 S. Ct. 1271, 1282, 14 L. Ed. 2d 179 (1965)). Plaintiffs' facial challenges are questions of law, while their as applied challenges are factual. The as applied challenges hinge on the vagaries of determining Plaintiffs' intent in the instant case, while the facial challenges hinge instead on the language of the statute, which is clear and unambiguous. This makes it quite uncertain whether as applied to Counts 1 and 2 any of the harms feared by Plaintiffs will come to pass.

In addition, the factual record as to Plaintiffs' intent is not developed enough for this Court to rule on Plaintiffs' Counts 1 and 2. In *Woodall v. Reno*, 47 F.3d 656 (4th Cir. 1995), the court in declining to hear a challenge to § 3(c)(2)-(3) of FACE (now codified at U.S.C. § 248 (c)(2) and (3)) stated: "the record before us is insufficient to present the ... issue in a 'clean-cut and concrete form.'" *Id.* at 658 (quoting *Renne v. Geary*, 501 U.S. 312, 322, 111 S. Ct. 2331, 2339, 115 L. Ed. 2d 288 (1991)). The factual record in this case is similarly deficient. There remains potential ambiguity as to Plaintiffs' intent, and this ambiguity would be for a jury to sort out in a trial, not for this Court to sort out in a pre-enforcement review. Plaintiffs' intent is a question of fact, not law, and this Court will not insinuate itself into what is rightly the province of a jury in a different case.

Even if the Court concluded that Plaintiffs' claims in Counts 1 and 2 were ripe, the Court would decline to exercise its discretion under the Declaratory Judgment Act. "Because declaratory and injunctive relief is discretionary, there is plenty of room for courts to deny improvident requests even if there is an otherwise ripe case and a realistic threat of prosecution." *New Hampshire Hemp Council, Inc. v.*

Marshall, 203 F.3d 1, 5 (1st Cir. 2000)(citing *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57, 113 S. Ct. 2485, 2495, 125 L. Ed. 2d 38 (1993))(citation omitted). On the issue of discretion, the Sixth Circuit has held that the following considerations should guide a district court in determining whether a declaratory ruling is appropriate:

> "The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed."

Grand Trunk W. R.R. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984)(quoting E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941)). *Grand Trunk* lists the following five factors that courts should consider in determining whether a declaratory judgment will yield these results:

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;(3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for

> res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Id.

The third, fourth, and fifth factors have no particular relevance to this case. However, the Court concludes that the first and second factors strongly counsel against this Court issuing declaratory relief. The Court's reasoning for both factors stems from the same concerns giving rise to problems with ripeness: the wide range of undefined activity. As mentioned above, at one end of the spectrum, certain activity would not be proscribed by FACE, while at the other end certain activity would clearly fall under FACE's coverage. Due to FACE's specific intent requirement, certain activity that, in isolation, might not appear to violate FACE, may be found to do so when considered in light of other circumstances which are too numerous and speculative to enable this Court to grant Plaintiffs any meaningful relief. Thus, this Court could not issue relief that would settle the controversy and serve a useful purpose in delineating the boundaries of lawful activity in which Plaintiffs could engage under FACE.

Counts 1 and 2 will be dismissed.

III. Plaintiffs' Motion for a Preliminary Injunction

Having concluded that dismissal of all Counts is warranted, Plaintiffs' motion for a preliminary injunction must be denied.

Conclusion

For the reasons stated in this Opinion, Defendants' motion will be granted, and Plaintiffs' motion will be denied.

An Order consistent with this Opinion will issue.

Dated: NOV 22 2000

/s/ _____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MICHIGAN, SOUTHERN DIVISION

No. 4:00-CV-141

[Filed November 24, 2000]

ANNELORE B. NORTON AND LOIS GREIFFENDORF, Plaintiffs,	)
v.	)
JANET RENO, et al., Defendants.	)

JUDGES:
GORDON J. QUIST, UNITED STATES DISTRICT JUDGE.

ORDER

In accordance with the Opinion filed on this date,

IT IS HEREBY ORDERED that Plaintiffs' Motion For Preliminary Injunction (docket no. 3) is **DENIED.**

IT IS FURTHER ORDERED that Defendants' Motion To Dismiss Plaintiffs' Complaint (docket no. 15) is **GRANTED.**

ALTERNATIVELY, IT IS FURTHER ORDERED that this Court declines to exercise its discretion to hear Counts 1 and 2 under the Declaratory Judgment Act. 28 U.S.C. § 2201(a).

This case is closed.

Dated: NOV 22 2000

/s/ _____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX E

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 13. CIVIL RIGHTS

18 USCS § 248 (2002)

§ 248. Freedom of access to clinic entrances

(a) Prohibited activities. Whoever--

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or

legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. Whoever violates this section shall--

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $ 10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $ 25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies.

(1) Right of action.

(A) In general. Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right

of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $ 5,000 per violation.

(2) Action by Attorney General of the United States.

(A) In general. If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent--

(i) in an amount not exceeding $ 10,000 for a nonviolent physical obstruction and $ 15,000 for other first violations; and

(ii) in an amount not exceeding $ 15,000 for a nonviolent physical obstruction and $ 25,000 for any other subsequent violation.

(3) Actions by State attorneys general.

(A) In general. If the Attorney General of a State has reasonable cause to believe that any person or group of

persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.
(B) Relief. In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. Nothing in this section shall be construed--

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. As used in this section:

(1) Facility. The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.